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Paul Kjellander  
Commissioner

**Idaho Public Utilities Commission**

P.O. Box 83720  
Boise, Idaho 83720-0074

Dirk Kempthorne  
Governor

ORIGINAL

September 28, 2004

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Washington, DC 20554

Re: Written Ex Parte Comments – Separately filed in the proceedings captioned:

*In the matter of IP-Enabled Services, Docket No. 04-36; In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC 03-211*

Dear Ms. Dortch:

We are writing to you as the State Members of the Federal-State Joint Board on Separations to notify the Commission of our concerns regarding the possible effect on jurisdictional separations that may result from Commission action in this docket. At NARUC's July meetings, Wireline Competition Bureau Chief Bill Maher indicated that the FCC may consider splitting off the generic jurisdictional issues raised in the above-captioned proceedings before the end of November. We believe such action will impact the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations. Such an impact indicates that a referral to the Joint Board pursuant to 47 U.S.C. § 410(c) and FCC action on that referral should precede FCC action in these dockets. If such a referral is granted, we believe the Joint Board would commit to expeditious action to produce a recommendation so the FCC may issue a timely order in the IP rulemaking. In addition to the referral, the State Members are concerned that some options being considered by the Commission may adversely affect the existing separations freeze.

Noted for the Board  
L. J. Anderson

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As the Supreme Court recognized in *Smith v. Illinois*,<sup>1</sup> procedures for the separation of intrastate and interstate property and expenses are necessary for the appropriate recognition of authority between the interstate and intrastate jurisdictions. Jurisdictional separations is an important part of telecommunications regulation for the states because it defines the constitutional lower limit of intrastate rates. The separations process must produce a reasonably accurate division of costs and revenues between the federal and state jurisdictions. It also must, with reasonable accuracy, assign costs to the same jurisdiction in which revenues are recorded.

This does not require that separations be exact. An interim freeze of the separations process, to avoid "compounding present difficulties" while considering separations reform, is generally permissible. *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984). On recommendation of this Joint Board, on May 22, 2001, the Commission entered an order freezing the Part 36 jurisdictional separations rules for five years. *Jurisdictional Separations Reform And Referral To The Federal-State Joint Board*, CC Docket No. 80-286, "Report and Order," FCC 01-162 (rel. May 22, 2001).

Some inaccuracy is inherent in any freeze, as usage patterns shift and change. That inaccuracy is permissible as long as it is (a) temporary and (b) within reasonable bounds. However, the *Smith* Court also said that:

[w]hile the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential, it is quite another matter to ignore altogether the actual uses to which the property is put." *Id.* at 150-151.

The State Members are concerned that the Commission may be considering options in these dockets that would cause the frozen separations system to become so inaccurate as to violate this standard. If, for example, the Commission were to make a decision that changes the jurisdictional nature of some calls (so that calls currently recorded as local are held to be interstate, for example), the existing separations freeze may become so inaccurate that it cannot be sustained without substantial modification, if at all.

At this time, the State Members are not prepared to say that any particular action by the Commission will, or will not, have an adverse effect on the freeze. The State Members are analyzing the situation and are preparing a report on the possible separations effects of some of the options before the Commission. We intend to file the report in this docket in

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<sup>1</sup> *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930).

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the near future. This letter is only intended to alert the Commission to our concerns.

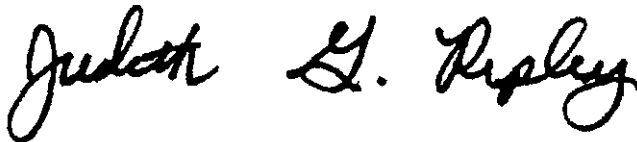
Sincerely,



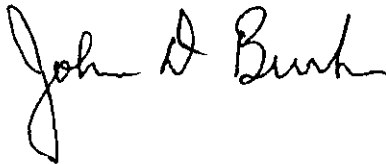
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State Chair of Federal-State Joint Board and  
President, Idaho Public Utilities Commission



Diane Munns  
Chair, Iowa Utilities Board



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